Responses to Questions Submitted
for the Record from Subcommittee Chairman Marino

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QUESTIONS AND RESPONSES

1. Most of the members are probably familiar with a few headline grabbing cases in which foreign antitrust agencies have seemingly acted out of hand. How systemic of a problem is this?

Law enforcement's effect on private conduct is often shaped by headline grabbing cases. For example, a headline announcing the government's execution of an individual for shoplifting would almost assuredly have a deterring effect regardless of whether the punishment is systematic. In the same way, headline cases reporting government threats against companies that seek to defend themselves in competition law investigations, or impose penalty decisions that substantially diminish the value of intellectual property rights, can have a chilling effect on those seeking to defend themselves or deciding whether to invest in costly research and development to create new technology.

Such headline grabbing cases include:

- China's National Development and Reform Commission's (NDRC's) nearly $1 billion fine against Qualcomm based on "unfairly high" or "excessive" pricing theories.[1] In contrast, U.S. antitrust law does not regulate price, given the risk of

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[1] Nat'l Dev. & Reform Comm'n, Administrative Penalty Decision No. [2015] 1 (Feb. 9, 2015) ("The NDRC finds that the Party [Qualcomm] violated Article 17, Paragraph 1, Item 1 of AML [Anti-Monopoly

deterring meritorious competition and incentives to innovate. Moreover, high prices in of themselves do not harm the competitive process. Instead, high prices signal to a marketplace that a particular sector is profitable, which *attracts* new or expanded entry, which leads to lower prices.[2]

- China's Ministry of Commerce's 2014 decision in Merck-AZ based on the controversial "conglomerate effects" theory,[3] under which the agency imposed remedies even though the parties had no overlaps in the relevant markets and AZ's worldwide photoresist share was only 30%. Remedies included prohibiting the companies from offering bundled sales of liquid crystal and global photoresist products and imposing price limitations and other restrictive terms on intellectual property rights. In contrast, enforcers in the United States, Germany, and Taiwan cleared the merger without conditions.[4]

- The Competition Commission of India's (CCI's) 2013 and 2014 prima facie orders against Ericsson based on unfairly high or excessive pricing theories.

Law] that prohibits enterprises with dominant market position from selling commodities at unfairly excessive prices.") (unofficial English translation of decision on file with author), http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html (Chinese).

[2] Absent information about the prices of unconstrained market transactions, it can be particularly difficult to identify a "fair" price. Indeed, it is even more difficult to assess the "fairness" of prices associated with licensing intellectual property rights both because the fixed costs of innovation require prices well above marginal cost in order to secure an adequate return on investments in innovation, and because intellectual property rights themselves are highly differentiated products, which makes reliable price comparisons difficult, if not impossible. The risk of placing overly strict limitations upon prices, or royalties, for intellectual property is that the return to innovative behavior is reduced, which means firms will reduce their investment in further innovations, to the detriment of consumers. Douglas H. Ginsburg et al., *Excessive Royalty' Prohibitions and the Dangers of Punishing Vigorous Competition and Harming Incentives to Innovate*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (Mar. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748252.

[3] *See e.g.*, William J. Kolasky, Deputy Assistant Attorney General, U.S. Department of Justice, Address Before the George Mason University Symposium: Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels (Nov. 9, 2001) ("After fifteen years of painful experience with these now long-abandoned theories [of competitive harm from conglomerate mergers], the U.S. antitrust agencies concluded that antitrust should rarely, if ever, interfere with any conglomerate merger. We could not identify any conditions under which a conglomerate merger, unlike a horizontal or vertical merger, would likely give the merged firm the ability and incentive to raise price and restrict output. We recognized, conversely, that conglomerate mergers have the potential as a class to generate significant efficiencies."), https://www.justice.gov/atr/speech/conglomerate-mergers-and-range-effects-its-long-way-chicago-brussels; Damien J. Neven, *The Analysis of Conglomerate Effects in EU Merger Control*, *in* HANDBOOK OF ANTITRUST ECONOMICS 183 (Paolo Buccirossi ed. 2008) (finding that there is little support in economic literature to suggest that conglomerate mergers raise significant anticompetitive issues unless there is no effective competition).

[4] Koren W. Wong-Ervin, *Antitrust and IP in China: Quo Vadis?* at 4 (2015), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_2015_aba_spring_meeting_4-16-15.pdf.

> Among other things, the commission preliminarily concluded that Ericsson violated India's Competition Act by including non-disclosure agreements (NDAs) in licensing agreements for standard-essential patents upon which the company had made a commitment to license on fair, reasonable, and non-discriminatory terms.[5] Given that the proper purpose of competition law is to protect the competitive process and not individual competitors, it is difficult to see how including NDAs in a license could harm the competitive process.[6] Indeed, in practice (i.e., outside of litigation), licensees generally demand NDAs as frequently as licensors because license agreements can be quite revealing about the licensee's business practices, risk preferences, and priorities, all information licensees would like to keep from their rivals.

With respect to whether certain foreign governments are using competition law to achieve industrial policy or other non-competition public interest goals, many foreign competition laws explicitly require the considerations of such factors. For example, China's Anti-Monopoly Law states that the law "is enacted for the purpose of . . . promoting the healthy development of the socialist market economy,"[7] and that "[t]he state constitutes and carries out competition rules that accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system."[8] Similarly, Japan's Anti-monopoly Act states that purpose of the Act is "to promote fair and free competition, . . . to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers."[9] The Introduction to India's Competition Act states that, in interpreting the Act, the Competition Commission should "keep[] in view . . . the economic development of the country."[10]

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[5] *See* CCI Order under Section 26(1) of the Competition Act, 2002, *In re: Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson* ¶ 17 (Nov. 12, 2013), http://cci.gov.in/sites/default/files/502013_0.pdf; CCI Order under Section 26(1) of the Competition Act, 20, *In re Intex Techn. Ltd., v. Telfonaktiebolaget LM Ericsson* ¶ 17 (Jan. 16, 2014), http://cci.gov.in/sites/default/files/762013_0.pdf; *see also* Koren W. Wong-Ervin, *Standard-Essential Patents: The International Landscape*, ABA INTELL. PROP. COMMITTEE NEWSL. 13-14 (Spring 2014), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/standard-essential_patents_the_intl_landscape.pdf.

[6] *See* Koren W. Wong-Ervin et al., *FRAND in India*, COMPLICATIONS AND QUANDARIES IN THE ICT SECTOR: COMPETITION ISSUES AND STANDARD ESSENTIAL PATENTS at 17-18 (Springer Intern'l, forthcoming Fall 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821344.

[7] Anti-Monopoly Law of the People's Republic of China, Ch. I, Art. 1, http://english.court.gov.cn/2015-08/17/content_21625234.htm.

[8] *Id.* Art. 4.

[9] Antimonopoly Act of Japan, Ch. I, Art. 1, http://www.jftc.go.jp/en/legislation_gls/amended_ama09/.

[10] Competition Act of India, Introduction, http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf.

With respect to due process, given the difficult if not impossible task of reliably measuring factors such as whether an agency provides meaningful opportunities for engagement, the best available evidence is likely anecdotal and circumstantial.

Based (at least in large part) on receiving numerous first-hand reports from a variety of companies of egregious due process violations, the U.S. antitrust agencies have spent significant resources over the last decade to address these issues. Multilateral organizations such as the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD) have joined these efforts, which include hosting roundtables,[11] working with agencies around the world to develop guidance and best practices documents,[12] and writing articles and giving speeches for domestic and foreign audiences.[13]

2. How would you evaluate the progress of international organizations to date to promote the adoption of best procedural and substantive competition law standards? What can U.S. antitrust agencies better do to support such standards?

As a threshold matter, it is important to understand what I (and many others) consider to be "best practices." Fundamentally, I am referring to economically-sound effects-based analysis

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[11] *See, e.g.*, *ICN Roundtable Discussion: Competition Agencies' Investigative Process* (Mar. 25, 2014), http://www.internationalcompetitionnetwork.org/uploads/library/doc944.pdf; *see also* Paul O'Brien, *Promoting procedural fairness through the ICN*, Fed'l Trade Commission Blog (Apr. 16, 2014), https://www.ftc.gov/news-events/blogs/competition-matters/2014/04/promoting-procedural-fairness-through-icn.

[12] INT'L COMPETITION NETWORK, INVESTIGATIVE TOOLS REPORT (2013), http://internationalcompetitionnetwork.org/uploads/library/doc901.pdf; INT'L COMPETITION NETWORK, COMPETITION AGENCY TRANSPARENCY PRACTICES (2013), http://internationalcompetitionnetwork.org/uploads/library/doc902.pdf; INT'L COMPETITION NETWORK, COMPETITION AGENCY CONFIDENTIALITY PRACTICES (2014), http://internationalcompetitionnetwork.org/uploads/library/doc1014.pdf; INT'L COMPETITION NETWORK, GUIDANCE ON INVESTIGATIVE PROCESS (2015), http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf; ORG. FOR ECON. CO-OPERATION & DEV., PROCEDURAL FAIRNESS AND TRANSPARENCY (2012), http://www.oecd.org/daf/competition/mergers/50235955.pdf; *see also* ABA Section of Antitrust Law International Task Force, *Best Practices for Antitrust Procedure*, ANTITRUST SOURCE 4-10 (Dec. 2015), https://www.americanbar.org/content/dam/aba/directories/antitrust/dec15_lipsky_tritell_12_11f.authcheckdam.pdf.

[13] *See, e.g.*, Edith Ramirez, Chairman, Fed. Trade Comm'n, Keynote Address at the Antitrust in Asia Conference: Core Competition Agency Principles: Lessons Learned at the FTC (May 22, 2014), https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf; Bill Baer, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks as Prepared for Delivery at the 41st Annual Conference on International Antitrust Law and Policy: International Antitrust Enforcement: Progress Made; Work To Be Done (Sept. 12, 2014), https://www.justice.gov/atr/file/517736/download; Koren W. Wong-Ervin, *Procedural Fairness and the Importance of Focusing Solely on Competition Factors in Competition Analysis*, INTERN'L ANTITRUST BULLETIN (ABA Section of Antitrust Law) (Aug. 2014), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_procedural_fairness_-_aug_2014.pdf.

that is limited to prohibiting conduct that harms the competitive process, and does not seek to achieve other objectives such as industrial policy, redistribution, or other political goals. (For an explanation of the dangers of and tradeoffs from considering non-competition goals in competition analysis, see my opening testimony pages 5-9, https://judiciary.house.gov/wp-content/uploads/2017/06/Wong-Ervin-Testimony.pdf)

Multilateral organizations play a critical role in promoting international convergence on best practices through soft law instruments such as recommended practices, as well as through the agency-to-agency interaction facilitated by such organizations (for example, interactions ranging from sharing experiences to providing peer pressure to conform with best practices). As one example of the ICN's achievements, over half of its member agencies that have merger enforcement have made changes to their laws and practices inspired by ICN merger recommendations. The U.S. antitrust agencies are critical leaders in these efforts.

Independent bodies are an important complement to the excellent work of multilateral organizations. Independent review is particularly important given that multilateral organizations are often led primarily by competition enforcement agencies that may have incentives to protect and even expand their enforcement powers, as well as to protect against reform efforts that threaten to limit their authority.

3. You note in your testimony that the preliminary way of addressing foreign competition enforcement agencies is public exposure and expressions of concern by the U.S. Government. Is there a sliding scale of responses that can be implemented? What would that look like?

Yes. At one end of the sliding scale are statements by U.S. antitrust agency officials to foreign competition enforcers. Further along the sliding scale are statements made by those at the highest-levels of our government to those at the highest-levels of foreign governments. Based on my experience, it is my belief that strong public statements of concern on issues such as due process, departures from economically-sound effects-based competition analysis, and the misuse of competition law to lower royalty rates for U.S. intellectual property rights in order to unduly benefit foreign implementers, are one effective means to spur needed change.

4. In your testimony you note significant concerns regarding the use of extraterritorial remedies, specifically recent decisions of the Korea Free Trade Commission. Can you elaborate on why that is such cause for concern?

Foreign regulation of conduct involving U.S. property and markets, including dictating the royalty rates and other terms upon which U.S. intellectual property right holders can license their U.S. property rights, likely conflict with U.S. sovereignty and principles of international comity. This is particularly the case when the conduct at issue has no direct effects on foreign consumers (i.e., consumers in the regulating jurisdiction), but rather is regulated in order to protect the regulating jurisdiction's local manufacturers or national champions. For example, the worldwide remedies imposed by the Korea Fair Trade Commission against Qualcomm apply to Korean companies even with regard to their operations outside Korea.

Imposing extra-jurisdictional remedies can also result in significant substantive conflicts with the competition agencies of other countries, particularly given the wide variety of approaches taken globally on competition matters generally and specifically with respect to matters involving intellectual property rights—namely with respect to honoring an IPR holder's core right to exclude others from using the invention.[14] Contradictory rulings place U.S. firms in the untenable position of being unable to comply with all orders at the same time. In addition, one agency imposing worldwide portfolio licensing remedies, including on foreign patents, for conduct that may be deemed procompetitive or benign in other jurisdictions, is likely to facilitate a lowest-common denominator approach.[15] Lastly, extra-jurisdictional remedies have the potential to produce significant negative effects on competition and welfare, particularly if conduct that is widely considered to be generally procompetitive is the object of one-country's worldwide prohibition.[16]

5. Consistent with the ICPEG Report, you recommend that the U.S. conduct an evaluation of the issues being discussed today; however, you note that we should begin with a self-study. Are there similar concerns foreign agencies have expressed about U.S. enforcement actions?

Foreign competition enforcers and judges frequently rely on U.S. enforcement and other actions to justify their conduct. For example, foreign enforcers and judges have pushed back when I have raised concerns about the use of competition law to achieve discriminatory industrial policy objectives, stating that the United States itself discriminates. One common example relied upon by foreign enforcers and judges is the U.S. Trade Representative's veto of the International Trade Commission's decision to grant an exclusion order in favor of a Korean company (Samsung) against a major U.S. company (Apple).[17]

Other common examples cited by foreign enforcers and judges to justify their own enforcement include the FTC's consent orders against Bosch and Motorola Mobility/Google and the U.S. Department of Justice Antitrust Division's (DOJ's) Institute of Electrical and

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[14] "Economic theory and empirical evidence show that IPRs—a central feature of which is the right to exclude—incentivize the creation of inventions, ideas, and original works. They also facilitate the sale and licensing of intellectual property (IP) by defining the scope of property right protection and lowering transaction costs, and they produce incentives to develop alternative technologies as well as improvements and other derivative uses." Comment of the Global Antitrust Institute, Antonin Scalia Law, George Mason University, on the Anti-Monopoly Commission of the State Council's Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights at 3 (Apr. 13, 2017) (internal citations omitted).

[15] *Id.*; *see also* Koren W. Wong-Ervin, *Protecting Intellectual Property Rights Abroad: Due Process, Public Interest Factors, and Extra-Jurisdictional Remedies*, COMPETITION POL'Y INT'L (Apr. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947749.

[16] Koren W. Wong-Ervin et al., *Extra-Jurisdictional Remedies Involving Patent Licensing*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (Dec. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2870505.

[17] Letter from Michael B. G. Froman, United States Trade Representative, to Irving A. Williamson, Chairman, United States International Trade Commission, https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF.

Electronics Engineers (IEEE) Business Review Letter (BRL). For example, enforcers in Asia have relied on the two FTC consents to support the use of the controversial "essential facilities" doctrine—a doctrine that the U.S. Supreme Court has made clear it will treat with great skepticism, stating that courts should be very cautious in recognizing exceptions to the general rule that even monopolists may choose with whom they deal.[18] Similarly, within days of the DOJ's issuance of its IEEE BRL, Chinese enforcers remarked that the DOJ's letter validates China's unfairly high pricing decision against Qualcomm, pointing to the section of the letter that essentially endorses the use of component (e.g., chipset) over end-user device licensing in arms-length licensing agreements.[19]

6. You have worked extensively with the FTC over the years. How would you evaluate the coordination between the various executive agencies that are responsible for interacting with foreign antitrust/competition agencies? Where do you see the most room for improvement?

In order to solve the problem of inappropriate use of competition laws, one must first clearly understand the problem. To that end, I reiterate my prior recommendation that the U.S government (led by the U.S. antitrust agencies) sponsor a study (bringing together enforcers, academics, and industry professionals) to determine whether there is evidence of discriminatory enforcement, the use of industrial policy, economically-flawed analysis, good faith analysis that misses the mark for other reasons, or sound analysis. The level of government intervention and interaction will necessarily depend on the nature of the problem. For example, discriminatory enforcement is likely best (and most effectively) addressed at high levels of the U.S.

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[18] *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) ("We have never recognized [the essential facilities] doctrine . . . and we find no need either to recognize it or to repudiate it here."); *see also* Maureen K. Ohlhausen, Remarks at GCR Live Conference: Antitrust Enforcement In China – What Next? (Sept. 16, 2014) ("During one of the . . . conferences I attended in China, I was listening to a presentation on the U.S. and Chinese antitrust laws and the FTC's decision in Google SEPs came up. The lecturer argued that the U.S. has a strong essential facilities doctrine and then drew a line from this supposed precedent (with no mention of *Trinko*) and similar European decisions to the Chinese Anti-Monopoly Law and other Chinese laws that prohibit unreasonable refusals to deal as to essential facilities. . . Turning to a slide that said 'inspiration from Google case,' the presenter reasoned that the FTC's decision in the Google SEPs matter meant that an 'unreasonable' refusal to grant a license for a standard-essential patent to a competitor should constitute monopolization under the essential facilities doctrine."), https://www.ftc.gov/system/files/documents/public_statements/582501/140915gcrlive.pdf. *See also* Koren W. Wong-Ervin & Joshua D. Wright, *Intellectual Property and Standard Setting*, 17 FEDERALIST SOC'Y REV. 52, 56-58, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2878955.

[19] *See generally* Koren W. Wong-Ervin, *Righting the Course: What the DOJ Should Do About the IEEE Business Review Letter*, COMPETITION POL'Y INT'L (Aug. 13, 2017) ("The DOJ should also renounce the sections of the prior administration's IEEE BRL that endorse certain policies . . . [that] went well beyond the DOJ's statutory mandate, which is limited to opining on whether the amendments raised antitrust issues, and were wholly unsupported by any evidence of their consequences, much less net benefits."), https://www.competitionpolicyinternational.com/righting-the-course-what-the-doj-should-do-about-the-ieee-business-review-letter/.

government, whereas the U.S. antitrust agencies (along with educational institutes such as my own at Scalia Law School) are particularly well-suited to address economically flawed analysis through economic and other training programs.

7. ChemChina and Sinochem are planning to merge next year, creating the world's largest chemicals group with $100bn of revenue. Under the current Coverage Rules, Section 802.52, this transaction might be exempt from Hart-Scott-Rodino (HSR) review since both companies are essentially state owned, despite the significant impact such a merger would have on the U.S. market. Do we need to update our Coverage Rules to ensure such transactions are properly reviewed?

a. SPECIFIC PROVISION: Section 802.52 – a proposed transaction will be exempt from HSR review if (a) The ultimate parent entity of either the acquiring person or the acquired person is controlled by a foreign state, foreign government, or agency thereof; and (b) The acquisition is of assets located within that foreign state or of voting securities or non-corporate interests of an entity organized under the laws of that state.

Anticompetitive harm caused by state-owned enterprises (SOEs) and state-supported enterprises is a serious issue that needs to be studied and addressed. Indeed, conferring upon SOEs privileges and immunities that are not available to their privately-owned competitors, or are not based on superior performance or efficiency, distorts competition in the market between state-owned and privately-owned rivals. In general, SOEs are not as efficient as privately-owned firms given that, unlike private firms, which are generally driven by profit, SOEs may have a number of other objectives including employment, social goals, or wealth distribution.[20] Use of SOEs to achieve non-market goals is generally a costly way to achieve such goals. These incentives can significantly affect their performance in the market and unnecessarily increase the costs of achieving those non-market goals.

With respect to Section 802.52 in particular, I defer to others as this is outside my areas of expertise. I note, however, that while transactions such as ChemChina/Sinochem may be exempt from the HSR Act, they are not exempt from Section 7 of the Clayton Act, i.e., the U.S. antitrust agencies can still investigate and challenge the merger. In addition, the motivation for Section 802.52 appears to be a recognition that U.S. antitrust laws should not interfere with sovereign decisions of other countries, following principles of international comity and the Act of State doctrine. Any efforts to amend this section should include a rigorous study that examines, among other things, issues of reciprocity and appropriate enforcement mechanisms (e.g., the ability to enforce non-compliance through fines or court orders with respect to companies over which the United States may not have jurisdiction).

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[20] *See, e.g.*, COMPETITION COMM., OECD, POLICY ROUNDTABLES: STATE OWNED ENTERPRISES AND THE PRINCIPLE OF COMPETITION NEUTRALITY 25-29 (2009), http://www.oecd.org/daf/competition/46734249.pdf.